

April 30, 1998

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JOSEPH C. FORREST,
Debtor.

BAP No. WO-97-101

JOSEPH C. FORREST,
Plaintiff - Appellant,
v.
INTERNAL REVENUE SERVICE,
Defendant - Appellee.

Bankr. No. 95-17244
Adv. No. 96-1066
Chapter 13

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, CLARK, and PEARSON, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

The chapter 13 debtor ("Debtor") appeals an order of the United States Bankruptcy Court for the Western District of Oklahoma denying his motion for summary judgment and granting a cross-motion for summary judgment filed by the Internal Revenue Service ("IRS"). The court held that the Debtor was not

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

able to avoid the IRS's tax lien or a notice of levy under 11 U.S.C. §§ 522(h) and 547(b). For the reasons stated below, the bankruptcy court's judgment is AFFIRMED.

I. Background

The Debtor performed construction management services as an independent contractor for National Beef Packing Co., L.P. ("NBP") during the period of August 26, 1995 through December 2, 1995. On November 9, 1995, the IRS issued, in relevant part, a notice of levy on NBP for the Debtor's wages, salary, and other income. The notice of levy in question was attributable to the Debtor's tax liability for 1987, which was secured by the IRS's lien against the Debtor's property. NBP has never paid the IRS under the notice of levy.

On November 30, 1995, the Debtor filed chapter 7. In his schedules, the Debtor claimed that 75% of his earnings from personal services contracts earned during the ninety days preceding his bankruptcy case were exempt under Okla. Stat. tit. 32, § 1A, and 11 U.S.C. § 522(b). The Debtor then commenced an adversary proceeding against the IRS arguing, in relevant part, that the IRS's notice of levy was avoidable under 11 U.S.C. §§ 522(h) and 547(b), to the extent that his NBP earnings were exempt under Oklahoma law and section 522(b). The parties filed cross-motions for summary judgment. The bankruptcy court granted the IRS's motion for summary judgment, and denied the Debtor's motion for summary judgment. Although the bankruptcy court held that the transfer of the Debtor's interest in the NBP earnings was preferential under section 547(b) and that the Debtor had standing to pursue the action under section 522(h), it concluded that the action must be dismissed because section 522(c)(2)(B) prohibited the Debtor from avoiding a properly filed tax lien on exempt property. After the bankruptcy court entered its final order and judgment, the Debtor timely filed a notice of appeal. *See* 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 7052 & 8001-8002.

II. Standard of Review

The facts determined by the bankruptcy court have not been contested by the Debtor on appeal, and the issue in this case is purely a question of law. Accordingly, we review the bankruptcy court's judgment *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

III. Discussion

This case involves an interpretation of section 522 of the Bankruptcy Code, which states, in relevant part, that:

- (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case, except--

. . .

- (2) a debt secured by a lien that is--

. . .

- (B) a tax lien, notice of which is properly filed[.]

. . . .

- (g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section . . . 550, 551 . . . of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

- (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

- (B) the debtor did not conceal such property

- (h) The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

- (1) such transfer is avoidable by the trustee under section . . . 547 . . . of this title . . . ; and

- (2) the trustee does not attempt to avoid such transfer.

11 U.S.C. § 522(c)(2)(B), (g)(1), and (h).

The bankruptcy court found that the Debtor had a right to avoid the transfer of the NBP funds under section 522(h) because the property was exempt

under Oklahoma law and section 522(b), the transfer was avoidable under section 547(b), and the trustee had not commenced an action to avoid the transfer.

Nevertheless, relying on Straight v. First Interstate Bank (In re Straight), 207 B.R. 217 (10th Cir BAP 1997), the bankruptcy court concluded that the Debtor could not avoid the transfer of the NBP funds because section 522(c)(2)(B) prohibited such a result. In Straight, this Court stated, in relevant part, that:

The Debtors' amended complaint makes clear that to avoid the IRS's interest in the vehicles, they were relying on 11 U.S.C. § 522(g) and (h), which generally permit a debtor to exempt certain property a trustee recovers through use of the avoiding powers, and under certain circumstances where the trustee has not done so, to exercise the avoiding powers to the extent the debtor could have exempted the property recovered if the trustee had done so. Even if the Chapter 7 Trustee could avoid the Tax Lien on the vehicles under section 545(2), the Debtors cannot. Section 522(c) . . . overrides the general exemption and avoidance powers granted in section 522(g) and (h), and precludes Straight from avoiding the Tax Lien in this case. *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250-52 (9th Cir. 1995).

Id. at 228. The bankruptcy court did not err in determining that section 522(c)(2)(B), as interpreted by this Court in Straight, compels the dismissal of the Debtor's avoidance action. Even if the Debtor has the power to avoid the transfer to the IRS in this case pursuant to sections 522(h) and 547(b), and that property is exempt under Oklahoma law and section 522(b) and (g), section 522(c)(2)(B) compels that the property nonetheless be liable for the IRS's debt as it is secured by a properly filed tax lien. Accordingly, avoiding the transfer would have no effect.

The Debtor argues, however, that section 522(c)(2)(B) does not apply to tax levies, but only to tax liens. Since the transfer in this case resulted from a tax levy and not from the creation of a tax lien, the Debtor maintains that section 522(c)(2)(B) does not apply. The Debtor's argument is flawed under the clear language of section 522(c)(2)(B), which provides that exempt property cannot be used to satisfy prepetition "debts," unless the "debt" is secured by a tax lien. Here, there is unquestionably a "debt" secured by a tax lien and, therefore, section 522(c)(2)(B) applies. *See* 11 U.S.C. § 101(12). It is irrelevant that the

IRS collected the “debt” secured by its lien through a tax levy.

The Debtor asserts that the IRS levy is unenforceable, as he did not have an interest in the NBP funds at the time that they were levied upon by virtue of having not yet invoiced NBP for his services. The Debtor first argues that the levy is unenforceable because the unmatured interest in the funds became property of the estate, with 75% of the funds subsequently claimed exempt under Oklahoma law and section 522(b) and (g). The Debtor concludes that the IRS is estopped from contesting the exemption, having made no objection to the initial claim in the schedules accompanying the Debtor’s chapter 7 filing. However, the Debtor misses the point. The IRS concedes the debtor’s claim of exemption but argues that, under section 522(c)(2)(B), the tax lien still applies. We conclude that the bankruptcy court correctly construed section 522(c)(2)(B) in upholding the IRS’s position.

The Debtor’s second challenge to the enforceability of the IRS levy is dubious and need not be addressed by the Court. Any argument that he was not owed wages by NBP at the time the IRS issued the levy undermines the Debtor’s contention that there is an avoidable preferential transfer under section 547(b). That section requires a “transfer of an interest of the debtor in property.” 11 U.S.C. § 547(b). If the Debtor is correct, there was no requisite transfer and the notice of levy would not be avoidable under sections 522(h) and 547(b). Under this scenario, even though the bankruptcy court would have been incorrect in its analysis, we nonetheless would have affirmed its order and judgment on other grounds.

IV. Conclusion

For the reasons stated above, the judgment of the bankruptcy court is AFFIRMED.